

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF TRANSPORTATION

In the Matter of the Denial
of Relocation Benefits to
Harry A. Bird
609 Main Street
P.O. Box 328
Onamia, Minnesota 56359-9693

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing in Milaca, Minnesota, on December 18, 1992, before Bruce D. Campbell, Administrative Law Judge from the Minnesota Office of Administrative Hearings.

Appearances: Joseph Plumer, Special Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103, appeared on behalf of the Department of Transportation (Department or DOT); and Harry A. Bird, Box 328, 609 Main Street, Onamia, Minnesota 56359-9693 (Mr. Bird or Complainant), appeared on his own behalf and on behalf of Reliable Recycling, Inc., a corporation whose registration with the Minnesota Secretary of State is pending, and American Heritage: of the People, Inc., a registered non-profit corporation. Mr. Harry A. Bird is the incorporator of both American Heritage: of the People, Inc. and Reliable Recycling, Inc,

The record closed on January 28, 1993, the date of receipt by the Administrative Law Judge of the final post-hearing memorandum of counsel,

This Report is a recommendation, not a final decision. The Commissioner of Transportation will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact James N. Denn, Commissioner of Transportation, 411 Transportation Building, St. Paul, Minnesota 55155, (612) 296-3000, to ascertain the procedure for filing exceptions or presenting argument,

STATEMENT OF ISSUES

The issues to be determined in this proceeding are whether Mr. Harry A,

Bird and/or Reliable Recycling, Inc, and/or American Heritage: of the
People,
Inc., are "displaced persons" within the meaning 42 U.S.C. 4601(6) and
Minn.

Stat. 117.50, subd. 3 (1992), so as to qualify them to receive relocation payments under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601, et seq, and Minn. Stat. 117.50 - 117-56 (1992), and, if so, the amount of relocation benefits, if any, each is entitled to receive.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Sherrill Stempf, Route 2, Box 109, Onamia, Minnesota 56359, operates a salvage yard in rural Minnesota near Onamia. On April 23, 1987, the State made an offer to Mr. Stempf to acquire a portion of his property for highway right-of-way purposes. The right-of-way subject to the offer constituted a long narrow strip of the Stempf property as it abutted Trunk Highway 169. The property was being acquired for highway widening purposes. The area subject to the offer also contained at least one structure, a building which had formerly served as the offices of the salvage yard but which, at the time of the offer, was not being used.²

2. Mr. Stempf resisted the attempts by the State to obtain the portion of his property for highway purposes. The Department commenced a condemnation action in district court under the title State of Minnesota v. Ross-Youngberg et al., Court File Nos. C6-89-886 and C4-89-885. On February 20, 1990, the Mille Lacs County District Court issued an Order in the eminent domain proceeding in favor of the State, On March 14, 1990, the State acquired title to the portion of the Stempf property at issue in the condemnation proceeding. Mr. Stempf was to vacate the property taken on March 29, 1990. Mr. Stempf refused to deliver possession of that portion of the Stempf property transferred to the State by court order. On March 27, 1991, the district court in Mille Lacs County issued an Order in an unlawful detainer action evicting the occupants from the strip of land in question.

3. Sometime in 1988, Mr. Harry A. Bird, the Complainant, moved his small trailer home onto a portion of the Stempf property. Mr. Bird had experienced a number of economic reversals and health problems. Mr. Stempf allowed the Complainant to live out of Mr. Bird's trailer on the Stempf property. At some undetermined time in 1988 or 1989, Mr. Bird moved into the Stempf residence, where Mr. Stempf lived with a female companion. Mr. Stempf also has several sons. It is not apparent from the record whether Mr. Stempf's sons were also residing in the Stempf residence

1A map of the Stempf Salvage Yard, showing its proximity to Trunk
Highway
169 is contained in DOT Ex. 1,

2The building contained on the strip of land subject to the offer is
shown in pink marking on DOT Ex. 1.

4, Sometime in 1989, Mr. Bird and Mr. Stempf's female companion experienced a number of serious disagreements. Mr. Bird moved out of the Stempf residence and into the former offices of the salvage yard, a free-standing building on that portion of the Stempf property that was the subject of the condemnation action. The building contained three distinct rooms, only some of which were occupied by Mr. Bird. The entire structure had about 800 square feet and Mr. Bird was living in 250-300 square feet of space. The building was, however, in a general state of disrepair. It did

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not have hot water service or indoor plumbing. Telephone service was only available through using Mr. Stempf's number. The general state of disarray noted in the photographs of the building is the result, however, of Mr. Bird being required to pack his possessions at the time of the forced relocation. Mr. Bird and Mr. Stempf had an oral agreement regarding payment by Mr. Bird for living in the former office premises. Mr. Bird was to pay Mr. Stempf \$100 per month and \$25 per month for utilities. No written lease was executed and Mr. Bird never actually paid Mr. Stempf for his occupancy of the premises. At the time, Mr. Bird had been on public assistance without gainful employment. Mr. Bird may have paid some minor portion of the utility costs on occasion, however. He did keep track of his indebtedness to Mr. Stempf resulting from the oral lease,

5. Both Mr. Bird and Mr. Stempf were aware when Mr. Bird began occupying the small building, that the property on which the building stood had been the subject of an offer by the State in 1987 and was currently the subject of a condemnation proceeding in state district court.

6. During Mr. Bird's stay at the Stempf premises, he was collecting public assistance. His meals were prepared and furnished through Mr. Stempf. Mr. Stempf's female companion cooked for Mr. Bird and laundered his clothes.

7. Mr. Bird was, at the time of his occupancy of the Stempf premises, a recovering alcoholic. Through his association with Mr. Stempf, Mr. Bird believed that he could enlist recovering alcoholics and abused women in the recycling business and open rehabilitation centers and safe houses for them with profits received from recycling. In April of 1989, Mr. Bird incorporated American Heritage of the People, Inc., a non-profit corporation whose purpose was to assist recovering alcoholic and chemically-dependent persons and to establish a network of safe houses for battered and abused women, children and the elderly. Recovering alcoholics were to be used in some fashion in the recycling activities that Mr. Bird contemplated. There is no evidence in the record that American Heritage of the People, Inc., ever conducted any business activities, possessed any business assets or actually existed otherwise than through its articles of incorporation.

3The building in which Mr. Bird lived is shown in pink coloration on DOI

Ex.

4 Pictures of the interior of the office structure are contained in DOT Ex. 3, DOT Ex. 4, and DOT Ex. 5.

8, On February 9, 1990, Mr. Bird submitted a proposal to the City of Onamia to recycle exclusively all of the City's solid waste. This activity was to be conducted through a for-profit corporation, Reliable Recycling, Inc. Mr. Bird drafted the Company's articles of incorporation in January of 1990. On February 2, 1990, the corporation was registered with the Minnesota Pollution Control Agency and on February 15, 1990, the business name, Reliable Recycling, Inc., was reserved with the Secretary of State for use by Mr. Bird's corporation. There is no evidence in the record, however, that the corporate existence of Reliable Recycling, Inc. has been finally perfected by filing the articles of incorporation with the Secretary of State.

9. On February 17, 1990, the Onamia City Council approved the recycling proposal of Reliable Recycling, Inc., and entered into a five-year contract with the Company. Initially, a six-month trial period of operations was to occur. Reliable Recycling, Inc. received a license from the City of Onamia sometime in March of 1990 and the corporation was registered with the United States Environmental Protection Agency

10, The business operations conducted under the name of Reliable Recycling, Inc., with the City of Onamia, were underwritten financially by Mr. Stempf, Mr. Stempf and Reliable Recycling, Inc, and Mr. Bird did not have a written agreement. It was Mr. Stempf's understanding that he would bear all of the expenses associated with the business and receive a share of the profits. Reliable Recycling, Inc. provided service to the City of Onamia for approximately five or six months between April and September of 1990. At the end of the six-month trial period and under threat of legal action for maintaining a public nuisance, Reliable Recycling, Inc. finally notified the City that it would cease to provide services,

11. During the period that Reliable Recycling, Inc. was collecting waste from the City of Onamia, the recyclable market had declined significantly and it could not market recycled material. The operation did not result in any profit to Reliable Recycling, Inc., and, in fact, Mr. Stempf invested significant funds in the activities of the business with no financial participation by Mr. Bird, who was still collecting public assistance.

12. The inventory of Reliable Recycling, Inc. collected from the City of Onamia was stored at various locations on the Stempf salvage yard. Mr. Bird and Mr. Stempf attempted to keep the recyclable inventory of Reliable Recycling, Inc. separate from the inventory of the Stempf salvage yard. A portion of the recyclable material was also stored in piles near the office building in which Mr. Bird was living. Mr. Bird conducted the business operations of Reliable Recycling, Inc. from his dwelling in the former office building which was the subject of the condemnation proceeding previously mentioned

13, On March 19, 1990, Mr. Bird wrote to DOT and informed the Department of his occupancy on the property and his intent to commence a recycling business with the City of Onamia. Mr. Bird recognized that the condemnation for highway purposes of the building in which he was currently living would necessitate his relocation and that of his businesses. Mr. Bird indicated his desire to stay in the general area of Onamia and asked for assistance in relocation, On March 28, 1990, Mr Bird again contacted the Department,

provided more information and requested the payment of whatever relocation assistance he was entitled to receive, including a fixed payment for the relocation of American Heritage: of the People, Inc., as an incorporated non-profit entity. In March of 1990, Mr. Bird investigated several proposals for relocation of his recycling business. The proposals eventually were not accepted because Mr. Bird lacked the necessary funds.

14. On April 3, 1990, the Department notified Mr. Bird that he would not receive any expenses for relocating Reliable Recycling, Inc., and that the benefits he would receive for his residential move would be limited to a lump sum payment. Between April of 1990 and March 19, 1991, when the decision in the unlawful detainer action was made by the district court in Mille Lacs County, Mr. Bird and the Department exchanged communications, meetings and written correspondence relating to Mr. Bird's entitlement to relocation benefits. The Department finally paid Mr. Bird \$750.00 as a lump sum payment for his residential move. The payment was based on its fixed schedule for moving five rooms of personal belongings. The Department also determined that Mr. Bird personally qualified for housing of last resort assistance under 49 C.F.R. 404, in that Mr. Bird was a bona fide resident of a structure that was taken for a highway purpose and he could not afford to pay for suitable replacement housing,

15. The lump sum payment made to Mr. Bird to compensate him for the movement of his personal effects was reasonable and in accordance with the schedule for personal moves established by the Department and the applicable federal regulations

16. There is no evidence in the record that Mr. Bird expended actual amounts for his residential move in excess of the \$750.00 paid him by the Department

17. After the decision in the unlawful detainer action, in April of 1991, the Complainant was relocated to a one-room apartment of approximately 100 sq. ft. in the Onamia Hotel. The apartment had no kitchen facilities, no private bath and little room for Mr. Bird's personal effects. Telephone service was provided by a pay telephone in the hall. At the time Mr. Bird was relocated, Resources Recovery, Inc. had long since ceased to pick up recyclables in Onamia or anywhere else. After a short period, Mr. Bird was relocated to a larger multi-room apartment in the Onamia Hotel. The Department indicated to Mr. Bird that they would pay the cost of his rent at the Onamia Hotel for as long as he was unemployed, up to a maximum of 42 months. They stated, however, that if he obtained gainful employment, they would cease making his rental payment. At the time of the relocation, Mr. Bird was still on public assistance, although he had completed a work-readiness program. Some five or six months after Mr. Bird had been relocated to the Onamia Hotel, he obtained full-time employment as a blackjack

dealer in a gaming establishment near Onamia. At that time, the Department ceased all rental assistance payments to Mr. Bird.

18, During the summer of 1990, Mr. Bird spent a significant amount of time and effort in attempting to find a relocation site for his recycling business. His efforts concentrated on large replacement facilities where the inventory of Reliable Recycling, Inc. could be entirely stored. Mr. Bird traveled approximately 850 miles and spent portions of 27 days in making the relocation search,

19, The Department advised Mr. Bird that the activities of Reliable Recycling, Inc. did not qualify as a business and that there would be no compensation paid the business for relocation or expenses incurred in attempting to obtain a replacement business location. The rationale of the Department is reflected in a letter to Mr. Bird, as Chief Operating Officer of Reliable Recycling, Inc., dated November 2, 1990:

The offer to acquire the right-of-way needed from Stempf was made April 23, 1987. You apparently became a residential tenant in 1988. Mn/DOT actually acquired the right-of-way needed for the highway project on March 14, 1990, You were apparently in the process of establishing your recycling business at about this time. We understand your permit with Onamia to pick up recyclable material was executed in June 1990.

Enclosed for your information is a copy of the portion of the right-of-way map showing the highway right-of-way taking from the Stempf property. It shows a long, narrow taking for the highway widening project, Although some structures are being acquired, there is little impact to the remaining property where Stempf's business is conducted You indicate in your recent letter that your inventory and personal effects are scattered throughout the Stempf property also, We assume, therefore, that the land you utilized to conduct your business is this remaining Stempf property which is not affected by the highway taking,

Based on our review, it appears you did not have an established business from April 23, 1987, the date of the state's offer, nor by March 14, 1990, the acquisition date. Even if your business did exist by the dates, it appears it is not being relocated due to the highway right-of-way taking. You are not, therefore, eligible for business relocation benefits, We understand Mn/DOT has offered to pay to move typewriters, office equipment, etc., associated with your business and located in your living quarters.

Ex, S to Bird Ex A.

20 The Department offered to move the recyclable inventory maintained by Reliable Recycling, Inc., off of the highway right-of-way, further back on the Stempf property. This offer was declined by Mr. Bird

21, It would have been possible for Mr. Bird to conduct the activities of Reliable Recycling, Inc. from the remaining Stempf property, if Mr. Stempf believed that its contract with the City of Onamia would result in a profit and payment to him, The principal reason Mr. Stempf requested Mr. Bird to move his recyclable inventory related to the personal difficulties that occurred between Mr. Stempf's female companion and Mr. Bird and Mr. Bird's long-standing significant indebtedness to Mr. Stempf.

22. Prior to its contract with the City of Onamia, Reliable Recycling, Inc. had no recyclable inventory that would have required moving or relocation. The contract with the City was approved by the City Council on February 17, 1990. The first pick-up date for Reliable Recycling, Inc. in Onamia was March 31, 1990. Bird Ex. B; Bird Ex. E. The Department acquired the right-of-way needed for the highway project, including the Stempf property and the building occupied by Mr- Bird, on March 14, 1990.

23, The need to relocate the office function of Reliable Recycling, Inc., resulted entirely from the taking of the Stempf property referenced in Findings I and 2, supra.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

I The Commissioner of the Department of Transportation has jurisdiction over the subject matter of the hearing pursuant to 42 U.S.C. 4601, et seq., 49 C.F.R. part 24 (1989), and Minn, Stat, 117.52, 161.36 (1992).

2. Proper notice of the hearing was timely given, and all relevant, substantive and procedural requirements of law or rule or regulation have been fulfilled and, therefore, the matter is properly before the Administrative Law Judge

3. Mr. Bird individually is a displaced person within the definitions contained in 42 U.S.C. 4601(6) and 49 C.F.R. 24.2(g), in that he lawfully occupied the real property prior to its acquisition for highway purposes,

4. The moving expense payment made to Mr. Bird for his residential move under 49 C.F.R, 24.302 was reasonable and in accordance with the applicable schedule approved by the Federal Highway Administration. The amount of the payment, \$750.00, was based on moving five rooms of personal effects, a generous estimation of the amount of personal property Mr, Bird would be required to relocate.

5. Mr. Bird does not qualify for a replacement housing payment under 49 C.F.R, 24.401 because he did not own the premises and had not occupied the premises for at least 180 days immediately preceding the initiation of negotiations for the property. 49 C.F.R. 24.41(a)(1)

6. Mr. Bird, individually, does not qualify for the 90-day occupant replacement housing payment authorized by 49 C.F.R. 24.402 because he was not an occupant at least 90 days immediately prior to the initiation of negotiations for the property.

7. Mr. Bird, individually, qualified for assistance payments under the housing of last resort provision, 49 C.F.R, 24.404(c)(3), Under that section he would be eligible for a rental subsidy for the amount by which the rent for comparable replacement rental housing exceeded 30 percent of his gross monthly household income. He would be entitled to that assistance for a

period of up to 42 months. 49 C.F.R. 24.404(c)(3). Since Mr. Bird was on public assistance during that period, he would be entitled to the rental subsidy for the amount by which the rent for replacement housing exceeded the amount designated in the assistance program for shelter and utilities per month or 30 percent of his grant. 49 C.F.R. 24.2(d)(8)(iii).

8. Mr. Bird would have been entitled to some rental assistance even if gainfully employed, as long as the rent for suitable replacement housing exceeded 30 percent of his gross monthly household income. 49 C.F.R. 24.404(c)(3)

9- Even though there is no evidence in the record regarding the monthly gross income of Mr. Bird after he became employed, it would be appropriate for the Department to pay Mr. Bird such rental payments as may be due him by application of the 30 percent standard contained in 49 C.F.R. 24.404(c)(3). It would be appropriate to condition such payments by the Department on Mr. Bird supplying appropriate payroll information,

10, The word "person" in the definition of "displaced person" includes an individual, a family, a partnership, a corporation or an association, 49 C.F.R. 24.2(q)

11. A business is defined in 49 C.F.R. 24.2(c) to include any lawful activity, except a farm operation that is conducted: 1) primarily for the purpose, sale, lease and/or rental of personal and/or real property, and/or for the manufacture, processing, and/or marketing of products, commodities, and/or any other personal property; or 2) primarily for the sale of services to the public . . . or by a non-profit organization that has established its non-profit status under applicable federal or state law. 49 C.F.R. 24.2(c).

12 The non-profit corporation American Heritage: of the People, Inc., had not engaged in any significant activity, as defined in 49 C.F.R. 24.2(c), prior to the acquisition of the subject property in March of 1990. That non-profit corporation is not a displaced person as defined in 49 C.F.R. 24.2(g) entitled to relocation benefits. There is no evidence in the record that any property of American Heritage: of the People, Inc., was required to be moved from the property taken for highway purposes.

13. Reliable Recycling, Inc., is a bona fide business entity that meets the definition of a "person" contained in 49 C.F.R. 24.2(q) and the

definition of conducting a business activity contained in 49 C.F.R. sec. 24.2(c),

14. As regards Resource Recovery, Inc., the only relocation necessitated by the acquisition of the Stempf real property for highway purposes on March 14, 1990, was the relocation of its office function. Some of the recyclable stock accumulated by the business was illegally stored on the Stempf property taken after March 14, 1990. Other portions of its recyclable inventory were stored on portions of the Stempf property not affected by the taking for highway purposes. As indicated by Mr. Bird's submissions, the first pickup of recyclable material in Onamia did not occur until March 31, 1990, several weeks after the acquisition of title to the property by the State

15. The only relocation assistance for which Reliable Recycling, Inc. is qualified is for the costs associated with the actual moving of its office equipment. The Department has already offered to move or reimburse Mr. Bird for moving such office equipment. There is no evidence in the record, however, that Reliable Recycling, Inc. owns or uses such business equipment,

16. Reliable Recycling, Inc. does not qualify for the payment of actual moving costs under 49 C.F.R. 24.303 with respect to its business inventory,

17. Reliable Recycling, Inc. does not qualify for reimbursement of expenses incurred in searching for a replacement location under 47 C.F.R. 24.303(a)(13).

18. Reliable Recycling, Inc. does not qualify for a fixed payment in lieu of moving expenses for a non-residential move, since it did not have any net earnings at the time of relocation. 49 C.F.R. 24.306(a).

19. Reliable Recycling, Inc. does not qualify for reimbursement for reestablishment expenses under 49 C.F.R. 24.304.

20. Good will and/or lost profits of a business are not recoverable as items of damage under 49 C.F.R. 24.305(c) & (d)

21. The Administrative Law Judge has no jurisdiction in this proceeding to enter any adverse personnel report into the personnel files of State employees, whether classified or unclassified.

22. Any Finding of Fact more properly termed a Conclusion and a Conclusion more properly termed a Finding of Fact is hereby expressly adopted as such.

THIS REPORT IS NOT AN ORDER AND NO RIGHTS OR DUTIES RESULT HEREFROM. THE COMMISSIONER OF TRANSPORTATION WILL ISSUE THE ORDER WHICH MAY ADOPT OR DIFFER FROM THE FOLLOWING RECOMMENDATION.

RECOMMENDATION

Based on the foregoing Conclusions, it is the recommendation of the Administrative Law Judge to the Commissioner that he determine that Mr. Harry A- Bird individually is a "displaced person" as defined in 49 C.F.R.

24.2(g), The Administrative Law Judge further recommends that the Commissioner find that Mr, Harry A. Bird, individually, has been paid the relocation benefits to which he is individually entitled, except as stated in Findings 14 and 17, supra, and Conclusions 7 - 9, supra. Additional payments to Mr. Bird, individually, should be made under the housing of last resort provision to the extent that Mr. Bird can demonstrate that the rental payments made for decent and safe substitute housing exceeded 30 percent of his gross income for any month between the date the Department ceased making rental payments, and a date 42 months from the date Mr. Bird initially was relocated to the Onamia Hotel.

The Administrative Law Judge recommends to the Commissioner that he determine that the non-profit corporation, American Heritage: of the People,

Inc., should not receive relocation assistance, since it was not engaged in any activity recognized in 49 C.F.R. 24.2(c).

The Administrative Law Judge finally recommends to the Commissioner that he determine that Resource Recovery, Inc., was a bona fide business operation commenced prior to the date of acquisition of the subject property, March 14, 1990, but that some of its business inventory was improperly moved to the subject property after that date in total disregard of principles of mitigation and other portions of its business property were stored on property not affected by the taking for highway purposes. Resources Recovery, Inc., would then be entitled only to relocation benefits associated with the actual cost of moving its office furniture, if any,

Dated this 25th day of February, 1993.

BRUCE D.CAMPBELL
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat, 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape recorded

MEMORANDUM

The dispute between Mr. Bird and the Department largely centers on the extent to which Resources Recovery, Inc. and American Heritage: of the People, Inc. should be entitled to benefits for relocation as a result of a taking of the portion of the Stempf salvage yard, reflected in DOT Ex 1. With respect to Mr. Bird individually, he is a displaced person within the definition of that term contained in 49 C.F.R, 24.2(g) in that he was forced to move from the subject property as a result of the acquisition of the real property in March of 1990. Mr. Bird had been a lawful occupant of the premises since sometime in 1989 and his removal from the former office building was the direct result of the taking. The rule does not require that he be in residence at the property at the time an initial offer was made by the State, here in 1987 Mr. Bird is, therefore, a displaced person entitled to benefits.

The initial benefits to which Mr, Bird is personally entitled are stated in 49 C.F.R. 24.302, which allows the payment of moving expenses in accordance with a schedule. The Department paid Mr. Bird \$750.00 as a flat payment for the movement of his personal effects. That schedule was based on the movement of five rooms of furniture. The estimate of five rooms is generous considering that Mr. Bird really lived in about a room and a half in the former office building. The Administrative Law Judge finds that the payment made to Mr. Bird for the movement of his personal effects was reasonable and satisfied the requirements of state and federal law.

There are several other replacement housing payments for which Mr. Bird might be qualified. 49 C.F.R. 24.401 provides a subsidy in the event that a person is the owner of the property and has been in residence at least 180 days prior to the initiation of negotiations for the subject property. Mr. Bird does not qualify for this subsidy since he did not own the property and was not a lawful tenant at the time of initiation of negotiations with Mr. Stempf in 1987.

49 C.F.R. 24.402 provides for a replacement housing payment where a person is an owner or tenant and has been in occupancy at least 90 days prior to the initiation of negotiations. Again, Mr. Bird does not qualify for this subsidy. He did not begin residing in the former office building on the Stempf property until sometime in 1989, several years after the initiation of negotiations with Mr. Stempf in 1987.

The Administrative Law Judge agrees with the Department that Mr. Bird qualifies for last resort housing payment assistance under 49 C.F.R.

24.404(c)(3), since Mr. Bird was a displaced person who was not eligible for payments under either 49 C.F.R. 24.401 or 49 C.F.R. 24.402 due to his failure to meet the length of occupancy requirement and because comparable replacement housing was not within Mr. Bird's means. The Department determined that 49 C.F.R. 24.404(c)(3) authorized it to make payments for Mr. Bird's rent as long as he was not gainfully employed. When he did obtain a job at a gaming establishment in the vicinity, the payments were discontinued. Mr. Bird contends that he has a right to 42 months of such payments irrespective of his income, The Administrative Law Judge does not agree with either party. Mr. Bird does not have an absolute right to 42 months of housing of last resort assistance, He does, however, have a right to such payments up to a maximum of 42 months to the extent that the cost of comparable replacement rental housing exceeds 30 percent of his gross monthly household income. It is also important to note that 49 C.F.R. 24.2(d)(8)(iii) applies this rule to the situation in which a person is obtaining government assistance, When a person is on government assistance, a payment under the housing of last resort provision should only be made to the extent to which the monthly rental for replacement rental housing exceeds 30 percent of the total amount of the grant or, where the grant identifies an amount for shelter and utilities, the amount by which the replacement housing exceeds the amount identified for shelter and utilities in the grant.

There is no evidence in the record as to Mr. Bird's earnings at the gaming establishment where he is employed, since the Department ceased to

provide rental assistance payments. It is possible that for some period of time and, perhaps, currently, the cost of replacement rental housing would exceed 30 percent of his gross income. To the extent that is the case, he is entitled to additional payments. If Mr. Bird believes that he is entitled to additional rental assistance payments under 49 C.F.R. 24.404(c)(3), he should document the amount to which he is entitled by providing the Department with appropriate payroll information and rental payment information. Upon being furnished with such evidence, the Department should continue making such payments as are appropriate under 49 C.F.R. 24.404(c)(3)

An additional complaint of Mr. Bird regarding his residential move is that his initial habitation at the Onamia Hotel, a 10' by 10' room with no

private bath or kitchen facilities did not constitute a "comparable replacement dwelling" as defined by 49 C.F.R. 24.2(d). He states that he was unable to perform office functions for Reliable Recycling, Inc, in the single room, 49 C.F.R. 24.204(a) prohibits the displacement of a person from his or her dwelling unless at least one comparable replacement dwelling is made available to the person. A comparable replacement dwelling is defined to require it to be "functionally equivalent to the displacement dwelling and to be adequate in size to accommodate the occupants." The small room with no bath in which Mr Bird was initially housed was not a comparable replacement dwelling within the meaning of 49 C.F.R. 24.2(d), That mistake was, however, corrected when it was brought to the attention of the Department. Mr. Bird was moved to a larger, multi-room apartment in the same hotel. Nor did his temporary housing in a single room have a substantial adverse impact on the office function of Reliable Recycling, Inc. By the time of his relocation, the Company had long since ceased any business operations. Even if the temporary housing of Mr. Bird in a single room did not constitute the provision of a "comparable replacement dwelling", however, the state and federal relocation statutes and federal regulations do not authorize the Administrative Law Judge to recommend the payment of damages for a failure to follow governing law, At best, such a violation would serve as a basis to refuse relocation or to commence a separate civil suit,

The primary dispute in this proceeding relates to Mr. Bird's entitlement to reimbursement for relocating businesses he conducted from his dwelling at the former office building on the Stempf property. Mr. Bird had incorporated American Heritage: of the People, Inc., on April 17, 1989, well in advance of the Department obtaining the right-of-way in March of 1990. The only relocation payment for which the non-profit corporation would even arguably qualify is the \$1,000 flat payment for a non-profit corporation stated in 49 C.F.R, 24.306(d), That payment, however, is conditioned on a finding that the non-profit corporation cannot be relocated without a "substantial loss of existing patronage (membership or clientele)." Further, the payment is in lieu of a payment based on gross revenues less administrative expenses received by the non-profit corporation during the previous two 12-month

periods prior to the acquisition. Here the non-profit corporation had neither membership nor clientele, It existed only on paper and in Mr, Bird's plans, The threshold test of loss of existing patronage has not been met, Further, the non-profit corporation had no revenues during the two twelve-month periods prior to the acquisition. The non-profit corporation does not qualify for the payment authorized by 49 C.F.R. 306(d).

The Administrative Law Judge finds that the non-profit corporation, American Heritage; of the People, Inc., is not qualified for any of the other relocation expense payments to be made on non-residential moves since the corporation was not engaged in any activity at the time of the relocation. 49 C.F.R 24.2(c) defines the word "business", as respects a non-profit organization as follows:

The term "business" means any lawful activity, except a farm operation, that is conducted:

- (4) By a non-profit organization that has established its non-profit status under applicable federal or state law.

There is no evidence in the record that the non-profit corporation was engaged in any activity or that it had any assets that required relocation. The non-profit corporation appears to be something that Mr. Bird envisioned that never materialized.

In his damage calculation, Bird Ex. B, Mr. Bird seeks approximately \$350,000 in lost profits of Reliable Recycling, Inc. This is the major portion of his damages estimated as \$363,504.83. Bird Ex. B, p. 3. It is clear that under the applicable federal regulations, the Administrative Law Judge may not award a grant of lost good will or lost profits to a business. 49 C.F.R. 24.305(c)(d)

The Administrative Law Judge concludes that Reliable Recycling, Inc. was a bona fide business corporation that was engaged in a business activity as defined in 49 C.F.R. 24.2(c). As such, it would be a person within the definition of 49 C.F.R. 24.2(q). It must further be determined, however, the extent to which Reliable Recycling, Inc. was a displaced person within the meaning of 49 C.F.R. 24.2(g), so as to qualify the business for receiving assistance payments.

The definition of a displaced person contained in 49 C.F.R. 24.2(g) requires that the person, including a corporation, move from the real property or move personal property from the real property as a direct result of the acquisition of such real property for a highway project. It is apparent to the Administrative Law Judge that the only removal of personal property that resulted from the acquisition of the property for the project was the required movement of any office furniture owned or used by the corporation. There is no evidence in the record that the Company had any such property. Although the City agreed to the recycling contract with Reliable Recycling, Inc., several weeks prior to the acquisition of the property by the Department on March 14, 1990, it did not begin to receive recyclables at the Stempf location until March 31, 1990, at the earliest. Bird Exhibits D and E show that the first scheduled pickups of recyclables in the Onamia area could not have occurred before March 31, 1990. Prior to that time, Reliable Recycling, Inc.'s only business activity had been to negotiate a contract with the City of Onamia. All of the equipment eventually used was borrowed Stempf equipment. Its employees, who received no wages, were the Stempf family and Mr. Bird. At most, prior to March 31, 1990, Reliable Recycling, Inc. had only some minimal office equipment and use of Mr. Stempf's phone service. It was only after the Department acquired title to the property that the Onamia recyclables began to accumulate on the Stempf property. Mr. Bird, knowing

that he had no right to further encumber the Stempf property that had been the subject of an eminent domain proceeding, brought recyclables onto the Stempf property and stored some of them on the right-of-way area that had been the subject of the taking. This is entirely contrary to mitigation of damage principles. Knowing that relocation would be required, Mr. Bird could not bring additional material onto the portion of the Stempf property taken and then claim entitlement to payment for its relocation.

The record also supports a conclusion that Mr. Bird was required to remove his recycling business from the Stempf property not because of the minimal taking by the State but because of the soured business relationship between himself and Mr. Stempf. The property taken was a long, narrow strip of land which included the former office structure. Most of the recyclables stored by Mr. Bird were stored on other portions of the Stempf property. If Mr. Stempf asked Mr. Bird to relocate off with the Stempf property it was because Mr. Stempf had tired of being Mr. Bird's benefactor. Mr. Stempf's feelings are reflected in DOT Ex. 7. He states his dissatisfaction with the financial relationship between himself and Mr. Bird and the amount of money Mr. Stempf lost in sponsoring Mr. Bird's recycling activities. This dissatisfaction was also influenced by the fact that at about the time of the taking, the market for recyclable material largely evaporated. Faced with the prospect of continuing losses on the Onamia contract, Mr. Stempf decided to discontinue the activity. In DOT Ex. 7, Mr. Stempf requests that he receive any reimbursement that would otherwise be due to Mr. Bird because of the amounts Mr. Bird owed him. The minimal taking of property involved did not necessitate a cessation of Mr. Bird's activities at the Stempf property. That occurred because of the deteriorated relationship between Mr. Stempf and Mr. Bird and the absence of a real market for recyclables in 1990-91.

The Administrative Law Judge does find, however, that expenses associated with relocating the office equipment and furniture of Reliable Recycling, Inc., if any, would be expenses necessitated by the taking of the property. It is beyond question that the building in which Mr. Bird had been living was demolished as a result of the taking. He may have stored some records of the Company in the building and he used Mr. Stempf's telephone for business purposes. The Department did offer to pay the cost of moving any office furniture owned or used by Reliable Recycling, Inc. and Mr. Bird declined. The Department also offered to have recyclables owned by Reliable Recycling, Inc. moved off the right-of-way and taken further onto the Stempf property. Again, Mr. Bird declined.

The Administrative Law Judge finds that with respect to the relocation benefits provided for by 49 C.F.R. 24.303, 24.304 and 24.306, Reliable Recycling, Inc., was not a displaced person within the meaning of 49 C.F.R.

24.2(g). Its inventory could have remained on the Stempf property if Mr. Bird and Mr. Stempf had continued their business relationship. To the extent that inventory was placed in the strip of land owned by the State after

March 14, 1990, that conduct was illegal. To the extent that Reliable Recycling, Inc. had "offices" in the substandard building in which Mr. Bird lived, the same degree of accommodation was ultimately available to Mr. Bird in his replacement housing in the Onamia Hotel. Neither the business, nor Mr.

Bird, should profit from application of the relocation statutes, federal or state, or the federal regulations,

Mr. Bird has also requested that the Administrative Law Judge order reprimands placed in the personnel files of named State employees associated with this dispute. The Administrative Law Judge expresses no opinion about the manner in which Department of Transportation personnel or Office of the Attorney General personnel dealt with Mr. Bird's relocation assistance request. No provision of state or federal law relating to relocation

assistance allows the Administrative Law Judge to place any personnel appraisal into the employment records of State employees. The Administrative Law Judge is strictly limited to the jurisdiction provided by the applicable relocation assistance statutes, both state and federal, and federal regulations,

B.D.C.